



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

February 29, 2016

Memorandum for: Deputy Commissioner, Trials

Re: **Captain Stephen Espinoza**
Tax Registry No. 925246
Gang Squad Brooklyn North
Disciplinary Case No. 2014-11567

The above named member of the service appeared before Assistant Deputy Commissioner Jeff S. Adler on October 14, 2015, and was charged with the following:

DISCIPLINARY CASE NO. 2014-11567

1. Said Captain Stephen Espinoza, on or about March 1, 2013, at approximately 2200 hours, while assigned to the Narcotics Borough Brooklyn North and on duty, in the vicinity of [REDACTED], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said apartment without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

In a Memorandum dated November 30, 2015, Assistant Deputy Commissioner Jeff S. Adler found Captain Stephen Espinoza Guilty of Specification No. 1, in Disciplinary Case No. 2014-11567. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

I have considered the totality of issues and circumstances in this matter and in light of both the length and extent of the entry undertaken, and considering Captain Espinoza's level of responsibility in holding the rank of Captain, a greater penalty is warranted. Therefore, Captain Espinoza is to forfeit seven (7) vacation days, as a disciplinary penalty.


William J. Bratton
Police Commissioner



POLICE DEPARTMENT

November 30, 2015

MEMORANDUM FOR: Police Commissioner

Re: Captain Stephen Espinoza
Tax Registry No. 925246
Gang Squad Brooklyn North
Disciplinary Case No. 2014-11567

The above-named member of the Department appeared before me on October 14, 2015, charged with the following:

1. Said Captain Stephen Espinoza, on or about March 1, 2013, at approximately 2200 hours, while assigned to the Narcotics Borough Brooklyn North and on duty, [REDACTED] engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said apartment without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED
CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Jonathan Fogel, Esq., Respondent was represented by Louis C. La Pietra, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty.

FINDINGS AND ANALYSIS

On the evening of March 1, 2013, Respondent walked into the apartment of Ron Dante Gilmore [REDACTED]. Respondent contends that he observed an individual smoking marijuana through the open front door of the apartment, and so he entered to investigate. It is CCRB's position that no one was smoking marijuana inside the apartment, and that the observations Respondent claimed to have made are just a pretext to justify his warrantless entry. At issue is whether Respondent had sufficient legal authority to enter the apartment. I find that he did not.

Gilmore testified that he lived in the apartment, [REDACTED] of a two-story single-family house, along with two roommates, Person A¹ and Person B. The railroad-style apartment doubled as a home office, where the three men did computer forensics and data recovery work under the business name Direct Data Discovery; this work was done primarily in what Gilmore described as "room two" of the apartment. "Room one" also contained studio equipment, which the residents sometimes rented out for use by outside clients, by invitation only. (Tr. 23-24, 30)

¹ There was some testimony that Person A, who was not present during this incident, was arrested at the apartment on January 13, 2013, that the arrest had garnered some media attention, and that Person A had filed a CCRB complaint against officers from the 77 Precinct. (Tr. 31-32, 116) However, based on the evidence, this tribunal rejects any suggestion that Respondent's conduct on March 1 was in any way motivated by the events of January 13.

In a calm and straight-forward manner, Gilmore described how on the night of the incident, he was inside the apartment, along with Person B, Gilmore's girlfriend, a friend who was photographing a model, and four or five clients who were using the engineering equipment. The clients were in room one, closest to the front door of the apartment, while Gilmore and Person B were at work in the adjoining room two. (Tr. 34) The front door to the apartment was about halfway open. (Tr. 37) According to Gilmore, at about 2200 hours he was suddenly surprised to see Respondent inside his apartment, peering into room two from inside room one. Respondent identified himself as "police". Several other officers also entered the apartment uninvited. (Tr. 38-41)

Gilmore described how the police gathered everyone into room one and started collecting identifications from the occupants. Gilmore maintained that he and Person B did identify themselves as residents of the apartment. Nevertheless, the police remained inside the apartment for about 20-25 minutes, writing down information from the identifications they collected. One officer also walked around the apartment. (Tr. 47-49) According to Gilmore, an officer then took him to the hallway and informed him that the police were there for a noise complaint, and there was nothing to worry about. (Tr. 49-50)

Gilmore insisted that no one inside was smoking marijuana, both because he didn't see anyone smoking and would have smelled the odor if anyone was smoking. His testimony in this regard came across as somewhat stubborn, as he maintained, with "absolute certainty", that there was no way marijuana was being smoked by anyone in the apartment, based in part on his knowledge of aerodynamics and the flow of air. (Tr. 51, 80-81) Similarly, he was steadfast in maintaining that the lawsuit he filed against the city

was only about stopping harassment, and he did "not necessarily" even want to get paid money; indeed, he claimed not to know the amount of money he was seeking. (Tr. 86-87) When asked if he felt a wrong had been done to him in this case, his terse reply was, "I don't feel that way. It's pretty much factual." (Tr. 85) But in recounting the facts of what occurred inside the apartment that night, Gilmore was detailed and consistent, and I found him to be a credible witness in that regard.

Respondent, who has been with the Department for about 15 ½ years, provided a different version of what occurred. At the time of the incident, he was a Captain with the Narcotics Division of the Organized Crime Control Bureau. Respondent testified that he went to the location at the request of his lieutenant, who asked him to make an observation of the address in connection with a complaint that had been filed. That complaint, known as a "kite", alleged that there were parties being held on the second floor of the location, and that marijuana was being sold there. Respondent arrived with two detective colleagues, and entered the building through the unlocked and slightly ajar front door. (Tr. 102-105)

Once inside, Respondent stated that he immediately smelled marijuana coming from the second floor. He walked up to that floor, where he observed that the front door of the apartment was open. Through the open door, Respondent claimed he observed a man sitting at a desk with what appeared to be a lit marijuana cigarette in his hand. Respondent stated that he then saw the man make a sudden motion to discard the cigarette, but he could not recall how specifically the man extinguished it. (Tr. 105-106, 137-141, 147)

Respondent testified that he knocked on the door, announced himself as police, and then entered the apartment to investigate. According to Respondent, his concern became whether the person smoking marijuana had a right to be inside the apartment as a tenant or a guest, or whether the people there were trespassing. In order to gain clarification, Respondent brought all the occupants into room one, and repeatedly asked them whether anyone lived there or was in charge of the apartment; no one responded affirmatively. Respondent then asked his colleagues to collect identifications from the occupants, which they did. (Tr. 106-109, 152, 166) Meanwhile, Respondent walked through the apartment, which he conceded had the dual purpose of making sure everyone was accounted for while also serving as useful intelligence gathering in connection with the kite complaint. (Tr. 168)

On its face, Respondent's description of the incident was plausible. The Captain came across as very professional in describing his reason for being there and how the events of that evening unfolded. However, video footage from security cameras inside the apartment (CCRB Ex. 2) does not support Respondent's version of what occurred. The man sitting at the desk can be seen on video for about 10 minutes before Respondent and the two detectives enter through the partially open door at 10:02:00; at no point does he appear to be smoking or holding a marijuana cigarette. Rather, his attention is on the computer screen in front of him; he seems to be smiling and laughing at some form of dance performance on the screen. At about 10:01:48, he gets a call on his phone, possibly a warning about the police, since he then turns and says something to the other people in the room; one of those, a man sitting to the left of the front door, appears to bend down to his right to place something on the floor, though there is no way

Respondent could have seen that from the hallway. It is highly unlikely that Respondent could even have seen the man at the desk from outside the apartment. Respondent may be correct that the positioning of the camera somewhat distorts his actual viewing angle; nevertheless, it appears that the apartment door would have blocked his view of the man at the desk until Respondent actually stepped into the apartment, which casts considerable doubt on the veracity of his account.

It is a basic principle of Fourth Amendment law that entry into a home without a warrant is presumptively unreasonable. This rule against warrantless entry is subject only to a few specifically established exceptions, such as where voluntary consent is granted or where "exigent circumstances" exist that justify the entry. In *People v. McBride*, 14 NY 3d 440 (2010), the Court of Appeals set forth factors to consider in determining whether exigent circumstances are present:

- (1) The gravity or violent nature of the offense;
- (2) Whether the suspect is reasonably believed to be armed;
- (3) A clear showing of probable cause;
- (4) Strong reason to believe the suspect is in the premises;
- (5) A likelihood that the suspect will escape if not swiftly apprehended; and
- (6) The peaceful circumstances of the entry.

In this case, there was no suggestion that anyone gave Respondent valid consent to enter the apartment. Rather, Respondent acknowledged that he just walked in on his own, claiming that he entered because he smelled marijuana and then observed a person inside smoking. Without any consent, Respondent stepped inside the apartment to investigate.

The next part of the analysis, then, is to assess whether there were exigent circumstances here that justified this warrantless entry. I find that there were not. First, the Captain's description of what he observed from outside the apartment was not entirely believable, particularly when compared with the video footage from inside the apartment, which did not corroborate Respondent's account; nothing in the video suggests that the man at the desk was smoking marijuana, and no marijuana was recovered. Second, even if Respondent's account were true, after considering the factors set forth in *McBride*, there were no exigent circumstances present here. Although Respondent's manner of entry was relatively peaceful, it was not in response to a violent offense, he was not seeking to apprehend an armed suspect, and there was no reason to believe that a suspect would escape if not apprehended quickly. In light of all the facts in this particular case, there was no urgent need that justified a warrantless entry into the apartment.

As such, CCRB has proven that Respondent's entry into Gilmore's apartment was done without valid consent, and without exigent circumstances to justify the entry. Accordingly, I find Respondent guilty of entering the apartment without sufficient legal authority.

PENALTY

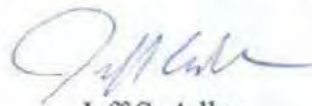
In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).

Respondent was appointed to the Department on March 1, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Here, CCRB asks that Respondent forfeit fifteen (15) vacation days as an appropriate penalty; that recommendation is excessive. Respondent, a highly-rated Captain who has been with the Department over 15 years, has one prior guilty adjudication for a discourtesy case in 2005. He came across on the witness stand as very conscientious about the performance of his duties. To be sure, there must be some level of accountability for his over-zealous decision to enter the apartment here without a warrant. But other recent cases involving unlawful entries have resulted in forfeiture of significantly fewer days. In *Disciplinary Case No. 11569-14* (September 10, 2015), a 10-year sergeant with no disciplinary history forfeited three (3) vacation days for entering an apartment without sufficient legal authority. And in *Disciplinary Case No. 12439-14* (October 13, 2015), a 17-year detective with no disciplinary history forfeited three (3) vacation days for entering an apartment without sufficient legal authority.

Under the totality of circumstances, the penalty imposed in each of those cases is appropriate here as well. Accordingly, I recommend that the disciplinary penalty should be the forfeiture of three (3) vacation days.

Respectfully submitted,



Jeff S. Adler

Assistant Deputy Commissioner – Trials



POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
CAPTAIN STEPHEN ESPINOZA
TAX REGISTRY NO. 925246
DISCIPLINARY CASE NO. 2013-11567

On his last three performance evaluations, Respondent twice received an overall rating of 5.0 "Extremely Competent" and once received a rating of 4.0 "Highly Competent." He has been awarded one medal for Excellent Police Duty. [REDACTED]
[REDACTED]

Respondent has been the subject of one prior adjudication. In 2005, he negotiated a penalty of two vacation days for being discourteous to an individual.

For your consideration.



Jeff S. Adler
Assistant Deputy Commissioner – Trials